LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 1 1975
MICHAEL RODAK, JR., CLERK

No. 75-797

IN THE

# Supreme Court of the United States

..... Term, 1975

JAMES A. ASHTON,

*Petitioner,*

vs.

UNITED STATES OF AMERICA.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

LAWRENCE R. ZEWE,
*Attorney for Petitioner,*
200 Global Building,
150 West Beau Street,
Washington, Pa. 15301.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15237
412-931-7433

INDEX.


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statute Involved | 2 |
| Statement | 3 |
| Reasons for Granting the Writ | 6 |
| I. The granting of the writ would be the 1st opportunity for this Court to reconcile the difference of circuits in their interpretation of the impact of *U.S. v. Maze* | 6 |
| II. The lower Courts have by their unwarranted extension of title 18 U.S.C. 1341 departed from the accepted interpretation of this Court's opinions in *Maze* and *Sampson* to such an extent as to call for this Court's exercise of its power and supervision | 10 |
| III. Was petitioner's conviction as charged so manifestly unjust as to justify the intervention of this Court? | 18 |
| Conclusion | 21 |
| Appendix A—Judgment Order | 22 |
| Appendix B—*Sur* Petition for Rehearing | 24 |
| Appendix C—Motion for a New Trial | 25 |
| Appendix D—Opinion and Order | 28 |
| Order of Court | 36 |
| Appendix E—Indictment | 37 |
| Appendix F—Testimony of Beatrice L. Hommer | 42 |

## TABLE OF CASES.

Page

Kann v. United States, 323 U. S. 88 (1944)..... 9, 18, 21
Parr v. United States, 363 U. S. 370 (1960)..... 9, 18, 21
Pereira v. United States, 347 U. S. 1, 74 S. Ct. 358, 98
2 Ed. 435 (1954) ..... 16, 18
Strauss v. United States, 516 F2d 980 (7th Cir., 1975) 7
United States v. Maze, 414 U. S. 395, 94 S. Ct. 645 (1974) 2, 6,
7, 8, 10, 11, 16, 17, 18, 21
United States v. Sampson, 371 U. S. 75 (1962) 2, 6, 7, 8,
10, 11, 12, 21
United States v. Travers, 514 F2d 1171 (2d Cir., 1974) 6, 7

## STATUTE.

18 USC 1341 ..... 1, 2, 3, 6, 7, 10, 20, 21

IN THE

# Supreme Court of the United States

..... Term, 1975

JAMES A. ASHTON,

v.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, James A. Ashton, by his attorney, Lawrence R. Zewe, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, affirming a conviction for using the mails to defraud, an offense under the mail fraud statute, 18 USC 1341.

### Opinions Below

The judgment order of the Court of Appeals (app. A, *infra* pp. 21-22) is not reported. The opinion of the District Court (app. D, *infra* pp. 27-35) is not reported.

### Jurisdiction

The judgment of the Court of Appeals (app. A, *infra* pp. 21-22) was entered September 5, 1975. A petition for rehearing was denied on October 1, 1975 (app. B, *infra* p. 23).

By order dated October 16, 1975, Mr. Justice Brennan extended the time for filing a Petition for Writ of Certiorari to and including November 30, 1975. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

## Questions Presented

I. The granting of the writ would be the 1st opportunity for this Court to reconcile the difference of circuits in their interpretation of the impact of *U.S. v. Maze*.

II. The lower Courts have by their unwarranted extension of title 18 U.S.C. 1341 departed from the accepted interpretation of this Court's opinions in *Maze* and *Sampson* to such an extent as to call for this Court's exercise of its power of supervision.

III. Was petitioner's conviction as charged so manifestly unjust as to justify the intervention of this Court?

## Statute Involved

The federal mail fraud statute, 18 USC 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be

delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

**Statement**

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts of using the mails to defraud (he was acquitted on five counts involving an unrelated matter) in violation of 18 USC 1341.

The petitioner, an attorney at law, represented a Beatrice and John Hommer, who were injured in an automobile accident in Arkansas. There were at least two potential defendants from whom the Hommer's claimed damages. In January of 1972, the Hommer's executed documents which released the carrier for one of the defendants from further liability. The release, executed by both Hommer's for Mrs. Hommer's claim and her husband's derivative claim for loss of consortium, was in the amount of $25,000.00, the limits of the coverage. The release signed only by Mr. Hommer for his individual claim was for $8,155.57. Home Insurance Company sent Ashton two checks for the respective amounts, one made payable to Mr. and Mrs. Hommer and Ashton, their attorney, and the other made payable to Mr. Hommer and Ashton. Ashton endorsed the checks as attorney-in-fact for the Hommer's and in his own right and deposited them in an account styled "James A. Ashton".

In 1972, there was marital discord between the Hommer's to cause both to seek specific legal advice from separate Pennsylvania lawyers.[1] Among the issues between the parties was an economic or financial settlement, according to At-

[1] Petitioner did not represent either of the Hommer's in their domestic problems.

torney Miller of Blair County, who represented Mr. Hommer and who testified for petitioner. On one occasion, Miller told petitioner that Mr. Hommer would sign nothing. Mrs. Hommer was suffering from the effects of the accident and was burdened by the illness of her mother. In November, 1972, when she was living separate and apart from her husband, she asked Ashton to send her some money. He did send her a certified check for $2,500.00 on November 2, 1972, a mailing which the Government used as a jurisdictional base. Another request of Mrs. Hommer resulted in the mailing of a check for $2,500.00 on January 4, 1973, the asserted jurisdictional base for the remaining count.

Mrs. Hommer stated that, in March, 1974, she learned for the first time that, when she and her husband signed the releases, the case against Home Insurance Company's assured was settled and that checks in settlement had been issued. She told Mr. Ashton that she wanted all of the proceeds of the $25,000.00 check, after his fees and the sums sent to her in 1972 and 1973 had been deducted. There was some dispute as to the exact amount. Ashton proffered $11,666.00, with a fee base of one-third; Mrs. Hommer demanded and received $14,250.00, asserting a smaller fee base. At the same time, Mr. Hommer received $3,375.00. Payment to both Hommer's was made in March of 1974. Subsequently, (July of 1974) petitioner was indicted.

The Government's theory of prosecution was that Ashton, after settling the Hommer's case, converted the settlement proceeds to his own use and used the United States mails as part of the scheme to defraud. The defense was that, at or about the time the releases were signed, the Hommer's became involved in bitter domestic difficulty, and notwithstanding Mrs. Hommer's demand for all of "her" settlement proceeds, Mr. Hommer would not release his derivative rights to her. Since the settlement failed to allocate a specific portion to husband and to the wife, in the wife's claim,

Ashton was in the position of being a stake holder of their funds. Admittedly, he deposited the proceeds, *i. e.*, $25,000.00, as their attorney-in-fact into his account and co-mingled the funds (co-mingling is not an offense in the State of Pennsylvania). The government did not prove a conversion of the Hommers' funds.[2] In November of 1972 and January of 1973, Ashton released a portion of the funds to Mrs. Hommer, and it wasn't until March of 1974 that he was able to secure Mr. Hommer's release of his derivative right and pay the entire balance, less fees and advances to Mrs. Hommer. The defense conceded that Ashton may have breached professional ethics and been guilty of poor judgment in the handling of the Hommer's affairs but vigorously denied any Federal wrongdoing.

Post-trial motions were seasonably filed (see app. C, pp. 24-26). On December 19, 1974, these motions were denied (see app. D, p. 35). On December 30, 1974, Ashton was sentenced to pay "a fine of $300.00 on each count for a total of $600.00 and to be imprisoned on each count for a period of three years, to be eligible for parole, however, upon serving three months, the sentence of imprisonment to be concurrent".

On appeal the conviction was affirmed (see app. A, p. 22). A rehearing was also denied (see app. B, p. 23).

---

[2] The Government contended that the alleged conversion involved only the $25,000.00, payable to Mrs. Hommer, Mr. Hommer, and Ashton. That draft was deposited on January 21, 1972. The Government proved that the balance in Ashton's account on January 25, 1972, was $21,161.53. The Government offered no further testimony or evidence on this subject beyond the above amount and date. Mrs. Hommer testified (app. F, p. 68) that Ashton was entitled to a 25% contingent fee.

## REASONS FOR GRANTING THE WRIT

**I. The granting of the writ would be the 1st opportunity for this Court to reconcile the difference of circuits in their interpretation of the impact of *U.S. v. Maze*.**

Since the decision of this Court in *United States v. Maze*, 414 U.S. 395 (1974) eight circuits have considered mail fraud cases in light of *Maze* (some were cases remanded by the Supreme Court for disposition specifically in view of Maze. Also there have been collateral attack on pre Maze convictions and affirmances). The 3rd circuit Court of Appeals has by its Judgment Order in the instant case made in effect an unwarranted Judicial extension of 18 USC 1341 to an extent and dimensions never contemplated or intended by Congress and beyond the holding of this Court in *Maze* and beyond the post *Maze* cases in other circuits.

The Court of Appeals misapprehended the requirements of the decisions of this Court for establishing conduct within the purview of the mail fraud statutes

> "There are not eleven omnipresences of federal law brooding over various portions of the United States; in the long run there is only one, although some time may be needed to reveal it."

Thus did Judge Friendly in *United States v. Travers*, 514 F2d 1171, 1174 n. 4 (2d Cir., 1974) describe the role of the Supreme Court as the "final expounder of federal statutory law."

In the instant case it has never been suggested that the decision in *United States v. Maze, supra*, overruled *United States v. Sampson*, 371 U. S. 75 (1962). Nor has it been suggested that these cases may not co-exist in the firmament of mail fraud cases. Yet, the lower Courts have blunted the thrust of Ashton's argument by relying on that part of this Court's

decision in *Maze* which sets forth its basis for adopting the *Sampson* result while ignoring the distinction the Court made between *Maze* and *Sampson*.

We suggest, as did Judge Friendly in *Travers, supra* and Judge Cummings in *Strauss v. United States*, 516 F2d 980 (7th Circuit 1975) that *Maze* was always the law.

It has always been the law of the United States that the mailings contemplated by 18 U.S.C. § 1341 must be sufficiently closely related to a scheme to defraud to convict. It has always been the law that a mailing which was part of a plan from the birth of the plan and which was designed to lull a victim is a mailing contemplated by 18 U.S.C. § 1341. This is what *Sampson* held and it is all that *Sampson* stands for.

One of the factors in *Sampson* is missing here: the intended use of the mails as a part of an original plan. In *Sampson*, at page 78, Justice Black found that "the *plan* called for a mailing of the accepted application together with a form letter to the victims . . . In short, the indictment alleged that the scheme, as *originally planned* by the defendants and as actually carried out included fraudulent activities both before and after the victims had actually given over their money to the defendants." (Emphasis added.)

There is absolutely no suggestion in the Government's theory of the case or in the facts before the jury that Ashton had formulated a plan which "called for a mailing."

The mailings here, in addition to being remote in time, clearly were not "originally planned" as *Sampson* requires, but were in fact requested by the victim.

Mr. Justice Rhenquist, while addressing himself to the same issue, as here, said in *United States v. Maze*, 94 S. Ct. 645 (1974) at Page 399:

> ". . . Under the statute, the mailing must be 'for the purpose of executing the scheme, as the statute requires',

*Kann v. United States*, 323 U. S. 88, 94 (1944), but 'it is not necessary that the scheme contemplate the use of the mails as an essential element'. *Pereira v. United States*, *supra*, at 8. The Government relied on *Pereira*, *supra*, and *United States v. Sampson*, 371 U. S. 75 (1962), to support its position, while respondent relies on *Kann v. United States*, *supra*, and *Parr v. United States*, 363 U. S. 370 (1960).

"In *Kann*, *supra*, corporate officers and directors were accused of having set up a dummy corporation through which to divert profits of their own corporation to their own use. As a part of the scheme, the defendants were accused of having fraudulently obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. This Court held that the fraud was completed at the point at which defendants cashed the checks:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." 323 U. S. at 94.

"In *Parr v. United States*, *supra*, the defendants were charged, *inter alia*, with having obtained gasoline and other products and services for their own purposes by the unauthorized use of a gasoline credit card issued to the school district which employed them. The oil company which furnished products and services to the defendants would mail invoices to the school district for payment, and the school district's payment was made by check sent in the mail. Relying on *Kann*, the Court again found that there was not a sufficient connection between the mailing and the execution of the defendants' scheme, because it was immaterial to the defendants how the oil company went about collecting its payment."

Both the District Court and the Court of Appeals misapprehended this Court's ruling in *Maze* and *Sampson*, *supra*,

and, in so doing, rejected the teachings of *Kann* and *Parr, supra:*

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law. *Kann v. United States*, 323 U. S. 88, 95:" *Parr v. United States, supra*, at 389-90.

The factual base of the Government's case against Ashton, as was the factual base in *Kann*, is that the fruits of the alleged fraud were received before the mailings which are the jurisdictional basis for the counts. In *Kann*, as here, the government urged that the scheme—the conversion—was not complete, but the Supreme Court specifically and directly rejected the urging and found that the mailings were not for the purpose of executing the fraud.[3]

Both lower Courts ignored the salient fact that the victim could have picked up in person the checks in question, thus negating the Government's theory that the mailings were for the purpose of executing the scheme. The Government's case fell far short of proving a conversion, notwithstanding the District Judge's mathematics. (app. D, p. 33).

Despite the failure of the indictment to mention it or the charge of the Court to fully explain the concept of law involved, the appellant heard for the first time, in the opinion of the District Court denying a new trial, "that the mailings were to hide the fact that he had long since received her money constituted a part of the scheme to convert her funds". (app. D, pp. 27-35). Ashton had the money on January 21, 1972. The alleged scheme was completed on that date. The mailings, approximately one year later, neither aided nor

---

[3] It should be noted that the *Kann* court was not unmindful of uses of the mails as a "means of concealment so that further frauds which are part of the scheme may be perpetrated" and condemned such as within the purview of the federal statute: pp. 94-95.

abetted the alleged conversion that took place when the funds were deposited in Ashton's account. What further action did he need to take to execute the alleged scheme? Nothing remained to be done; he had possession and control of the fund when the bank credited his account. The scheme was now complete. There was nothing further to execute. The inescapable conclusion being appellant's mailings had nothing to do with the execution of the scheme any more than if the victim had picked up the checks in his office or, in the alternative, he failed to honor her request for money and did nothing.

**II. The lower Courts have by their unwarranted extension of title 18 U.S.C. 1341 departed from the accepted interpretation of this Court's opinions in *Maze* and *Sampson* to such an extent as to call for this Court's exercise of its power of supervision.**

The District Court, in refusing post-trial motions of petitioner, held that ". . . *the fact that he mailed two checks to her in the meantime, each in the sum of $2500.00, apparently to hide the fact that he had long since received her money, constituted a part of the scheme to convert her funds and justified submitting the mail fraud charges to the jury.*" (Emphasis ours) (app. D, p. 33).

The District Court reached the above conclusions notwithstanding the fact that the alleged "lulling" mailings were in fact unplanned and occurred eleven months after the alleged wrong doing. At no time was it ever contended that petitioner could have foreseen that, months after the alleged conversion, his client would request that two checks be mailed to her to aid an ill mother. To hold such mailings to be an integral part of a scheme to defraud, when no other appellate court has, should not be easily or lightly done, as was apparently the approach of the Court of Appeals when it af-

firmed the conviction without an opinion and only a footnote appended to its judgment order (app. A *infra*) to rationalize its order. The pertinent portions of said order are set forth as follows:

> "After considering the contentions raised by appellant . . .
>
> II. The mailings which allegedly form the basis for federal jurisdiction are not sufficiently closely related to the alleged scheme to bring appellant's conduct within the mail fraud statute[1] . . . the judgment of the District Court to and is hereby affirmed.
>
> [1] See *United States v. Maze*, 414 U. S. 395, 403 (1974), and particularly p. 403 where *United States v. Sampson*, 371 U. S. 75 (1962) is cited with approval." (app. A, p. 22).

Further, in *Sampson, supra*, this Court apparently relied on the fact that the indictment in that case . . . "alleged that the defendants' scheme contemplated from the start the commission of fraudulent activities which were to be and actually were carried out both before and after the money was obtained from the victims. The indictment specifically alleged that the signed copies of the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. We cannot hold that such a *deliberate and planned* use of the United States mails by defendants engaged in a nation-wide, fraudulent scheme in pursuance of a previously formulated plan could not, if established by evidence, be found by a jury under proper instructions to be "for the purpose of executing" a scheme within the meaning of the mail fraud statute. For these reasons, we hold that it was error for the District Court to dismiss these 34 substantive counts". (footnote omitted) (Emphasis ours).

Again, a *Sampson* factor is missing. Here the indictment is silent and fails to suggest that any subsequent mailings were

for the purpose of "lulling" the victim into a false sense of security or for the purpose of delaying discovery. The lower Court's charge to the jury was also silent on this subject. The appropriate paragraphs of the instant indictment are set forth as follows (app. E, pp. 36-40):

". . . COUNTS 2-3

The grand jury further charges: . . .

17. On or about the dates listed below, in the Western District of Pennsylvania, James A. Ashton, defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly and wilfully:

Placed and caused to be placed the letters listed below in the United States mails to be sent and delivered according to the directions thereon by the postal service of the United States each being a separate count of this indictment:

| *Count* | *Sender* | *Addressee* | *Date of Mailing On or About* |
|---|---|---|---|
| 2 | James A. Ashton | Beatrice Hommer<br>1210 Madison Ave.<br>Apt. 1<br>Altoona, Pa. | November 2, 1972 |
| 3 | James A. Ashton | Beatrice Hommer<br>1210 Madison Avenue<br>Apartment 1<br>Altoona, Pa. | January 4, 1973 |

All in violation of Title 18, United States Code, Section 1341."

An examination of the testimony of the alleged victim negates any planned use of the mails as required by *Sampson, supra.* (app. E, pp. 36-40).

". . . *HOMMER—CROSS* (app. F, pp. 43-44)

BY MR. FREELAND:

Q. And both of these letters, Mrs. Hommer, were sent to Altoona, Pennsylvania.

A. That's where I lived at that time.

Q. Right. A check in the sum of $2500 was enclosed, is that right?

A. That's right.

Q. Had you requested that Mr. Ashton mail to you a certified check just prior to November 2nd, 1972?

A. Yes, I asked for some money. I was pretty desperate at that time.

. . . Again (app. F, p. 44)

Q. Now in connection with Government Exhibit 23, which is the letter of January 4, 1973, you have indicated—in fact, this was sent registered mail, return receipt requested?

A. That's right.

Q. And there was a check enclosed, also; is that right, $2500?

A. That's right. $2500.

Q. And had you called Mr. Ashton and asked him to mail you another check?

A. Yes, I did. There was illness in my family. I need it badly.

". . . HOMMER—DIRECT (app. F, p. 48)

A. My husband and I were suing the City of Hope. It was a city dump truck, and then we were suing the Pacattes, a couple that was supposed to have pulled out in front of the truck, causing the truck to put on its brakes and come over into our car.

Q. In fact, is that action still pending and unsettled?

A. The Pacatte case is, yes.

Q. As time went by, did you have occasion at any time to contact Mr. Ashton to find out what the status of your case was?

A. Oh, yes. I was in pretty constant contact with him.

Q. And did he tell you anything about what was happening?

A. They were pending. They were going to be settled. I went through several physical examinations for the records.

Q. At any time, did you and your husband give Mr. Ashton authority to settle a portion of the case? A. I believe we did.

Q. And do you recall approximately when that would have been?

A. Well, it was some time the end of '71 or first part of '72.

. . . Again: (app. F, pp. 49-50)

HOMMER—DIRECT

THE COURT: Just what he said, Mrs. Hommer, if you can remember.

THE WITNESS: Everything would be settled at the same time. I would get all of the money at the same time, the Pacatte money and the City of Hope.

Q. Did you at any time after you had agreed to settle at least with the city, did you at any time then question Mr. Ashton as to when your money would be coming or whether or not you could get part of it?

A. Yes. I kept wanting to know when it was going to be settled, and I was getting to the point I was willing to take anything.

Q. And why was that?

A. Well, my husband and I separated, and illness and quite a few other things.

. . . Again: (app. F, p. 51)

Q. Now, did he tell you over the phone why he was giving you these checks and what the legal understanding of that would be?

A. No. I don't believe. I don't believe that ever came up. I was very emotionally upset, and with—I was crying several times there, and he asked if the $2500 would help, he would get it off the next day.

. . . Again: (app. F, p. 61)

Q. Now, do you know, Mrs. Hommer—Strike that.

Now, you have indicated to us that you and your husband who have been married for 26 years have been separated for about two, is that about right?

A. We separated the 19th day of June of '72.

. . . Again: (app. F, pp. 62-63)

Q. Do you ever remember Mr. Ashton's telling you that your husband wanted a piece of the $25,000?

A. Yes. I do remember my husband, I mean Mr. Ashton telling me that, and my husband says that there is—it isn't right, that the only thing he wanted was his $4,000.

Q. Okay. Well, now, were you ever in Mr. Ashton's office when Mr. Ashton sought to contact or call your husband or any attorney who may have been representing your husband?

A. No. I wasn't in his office when he made the call. I knew that he made the calls.

Q. What calls do you now remember or did you learn were made by him?

A. I learned Mr. Ashton had called my husband and also my husband's attorney, Mr. Miller.

Q. Mr. Miller in Altoona?

A. Yes, Harold Miller.

Q. And when was that, if you remember?

A. I had my husband in court February the 9th of '73 for support. It was just prior to that time... It was after my husband had retained Mr. Miller and prior to that time he hadn't had Mr. Miller, so it was just shortly prior to the hearing.

. . . Again: (app. F, pp. 66-67)

Q. Mrs. Hommer, did Mr. Ashton ever tell you that your husband made claim to part of the $25,000 settlement from the City of Hope?

A. Yes, Mr. Ashton did tell me that.

Q. Could you tell us, to the best of your recollection, when he told you that?

A. Mr. Ashton told me that he was afraid Jack would claim part of—would try to claim half of it. He never told me that Jack had made a definite claim. He told me that Jack told him when the settlement came that he wanted half of it or something like that.

POOR COPY

. . . Again: (app. F, p. 67)

> Q. Now, did you ever ask your husband directly and specifically whether he made or was making a claim to any part of the $25,000?
>
> A. I was too angry at my husband to ask him anything. If he felt that way, if he felt he deserved it, I did say to him once that he didn't deserve it. That was in anger, but I never asked him."

The above testimony of Mrs. Hommer clearly and accurately reflects a confused legal situation insofar as the alleged victim and all parties involved were concerned, by being faced with a joint tort feasor settlement compounded by a husband's asserted claim for medical expenses and consortium; separation, non-support proceedings, and the pending of legal action in Arkansas. (The Government elected not to call Mr. Hommer to testify). Appellant would have had to be endowed with extrasensory perception to have foreseen the chain of events testified to by the alleged victim so as to use the mails one year later to "hide the fact that he had long since received her money".[5]

*Pereira v. United States*, 347 U. S. 1, 8-9, 74 S. Ct. 358, 363, 98 2 Ed. 435 (1954) held that "one causes the mails to be used where he does an act with *knowledge* that the use of the mails will follow in the ordinary course of business, or where such use can *reasonably be foreseen*, even though not actually intended . . ." (emphasis ours). Nowhere does the Government's case support either of the two *Pereira, supra*, options. *Pereira* was cited with approval in *Maze, supra*.

---

[5] Opinion of the District Court (app. D, pp. 27-35).

The District Court apparently equates receiving a sum payable to three parties with converting Mrs. Hommer's money. Nowhere does it appear nor was it shown how much Mrs. Hommer was entitled to on January 21, 1972, absent her husband's refusal to release his derivative claim for medical expenses and loss of consortium. Mrs. Hommer's expenses exceeded $12,000.

In *Maze*, Mr. Justice Rhenquist posed the appropriate question:

> "But the more difficult question is whether these mailings were sufficiently closely related to respondent's scheme so as to bring his conduct within the statute."

He answered it in the negative.

Had the trial court posed the same question, it could not have said, as it did:

> "The fact that he mailed two checks to her in the meantime, each in the sum of $2,500, *apparently* to hide the fact that he had long since received her money, constituted a part of the scheme to convert her funds and justified submitting mail fraud charges to the jury." (app. D, pp. 27-35). (Emphasis added).

The trial court recasts the crucial language of the statute by adding to "for the purpose of executing such scheme or artifice or attempting so to do" the words "or apparently hiding the fact that he had received the money". In footnote 10 of *Maze*, p. 405, Justice Rhenquist warns:

> "If the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court".

The initiative of the lower court was inappropriate.

One other lesson may be learned from *Maze*—t[illegible]s from Mr. Justice White's dissent, at page 653:

> "The majority mysteriously ignores prior decisions that 18 U. S. C. § 1341 reaches 'cases where the use of the mails is a means of concealment so that further frauds[5] which are a part of the scheme may be perpetrated. *Kann v. United States, supra,* 323 U. S., at 94-95. See *United States v. Hendrickson,* 394 F. 2d 807 (CA6 1968), cert. denied. 393 U. S. 1031 (1969); *United States v. Riedel,* 126 F. 2d 81, 83 (CA7 1942); *United States v. Lowe,* 115 F. 2d 596, 599 (CA7 1940), cert. denied, 311 U. S. 717. More-

over, it fails to take appropriate account of our most recent decision construing § 1341. In *United States v. Sampson*, 371 U. S. 75 (1962), an indictment for mail fraud had been dismissed by the District Court on the ground that the mailings after the money had already been obtained from the victims were not 'for the purpose of executing' the scheme to defraud. We reversed." (Footnote omitted).

Even the dissent in *Maze* would require factors not present here to convict: *i.e.*

a. Use of the mails as a means of concealment.

b. So that *further* frauds which are part of the scheme may be perpetrated.

Mr. Justice White chided the majority in *Maze* for "mysteriously ignoring prior decisions . . ." We feel such language is appropriate to the action of the District Court and Court of Appeals for "mysteriously ignoring" the decision of this Court in *Maze, Parr, Kann,* and *Pereira, supra.*

**III. Was petitioner's conviction as charged so manifestly unjust as to justify the intervention of this Court?**

The Government's case against Ashton consisted in the main of the testimony of Mrs. Hommer, which is set forth in its entirety in app. F, pp. 41 to 71. In addition, an insurance company employee identified releases and drafts. Ashton's bank records were introduced showing only a deposit of January 21, 1972, and the balance on January 25, 1972. Omitting the openings and closings and remarks of counsel and the charge of the Court, the Government's case, time-wise, on the instant counts lasted about the same length of time it takes to read this petition. The government's case was bottomed on a conversion of Mrs. Hommer's funds, no others, or no other funds were involved or mentioned in the indictment. Its theory was that Ashton converted $25,000.00 of Mrs. Hommer's money, ignoring the fact that in January of 1972 both

Ashton and Mr. Hommer had a substantial claim to the fund. The claim of both Hommers was unliquidated. The Government failed in its burden to show what funds, if any, were converted, of Mrs. Hommer. At no time did it call Mr. Hommer, or show that he had relinquished his claim to the fund, prior to March of 1974 when he in fact did so. Mr. Hommer was available and under no physical or other impediments to testify. The trial court in sustaining the conviction "comingled" the $25,000.00 of the victim, her husband, and attorney with a second check for $8,155.57, payable to Mr. Hommer in his own right and Ashton. Admittedly, there never was any contention that the latter amount was converted. It was not the subject of the indictment, nor was Mr. Hommer ever mentioned in the indictment. Yet the Court, to make the books balance and show a conversion, used the figure to cure a fundamental weakness in the prosecution's case. Let us re-examine the mathematics of the trial judge.

> ". . . Reason 4 asserts error in submitting to the jury the question of a conversion of funds in the Hommer settlement. There was ample evidence that the defendant converted these funds.
>
> Upon receipt of the two checks from the insurance company (GX30 and GX31) totalling $33,155.57, the defendant deposited them in his personal bank account in Western Pennsylvania National Bank on January 21, 1972. Immediately prior to this deposit, the balance in his account was $1,793.98 (See January 25th bank statement, GX37). From January 21 through January 25, 1972, the defendant drew 16 checks on this account totalling $13,788.02 leaving a balance at the close of business on January 25, of $21,161.54. At most, the defendant was entitled to a 25% contingent fee[4] in the amount of $8,288.89, which would leave the amount due the Hommers of $24,866.68. Obviously, he converted part of their money". (app. D, pp. 27-35). (Footnote omitted.)

We would recast the trial Court's figures as follows: the amount allegedly converted, as per the indictment and

Government's case, was $25,000.00—not $33,155.57. A 25% fee of $25,000.00 is $6,250. Deducting this sum from the $25,000.00 claimed by Mrs. Hommer, there would be a balance of $18,750.00 due both Mr. and Mrs. Hommer. The balance proved was $21,161.53—more than adequate to pay the Hommer's. "Obviously" (the phraseology of the trial Court) the Government failed to prove a conversion of *any part* of their money.

The subsequent release of Mr. Hommer's derivative claim in March of 1972 did not have the retroactive effect of supporting the Government's theory that Mrs. Hommer was entitled to the funds, or any portion of them. Under applicable law, he was entitled from this settlement to reimbursement for medical and other expenses, in excess of $12,000.00, and an additional sum for the loss of consortium of his wife. His derivative claim alone realistically could have exhausted the balance, leaving little or nothing for Mrs. Hommer. Yet at no time did the Government show just what Mrs. Hommer was entitled to on January 21, 1972, the date of the alleged conversion. The Government's entire proof in this matter was founded on the demand of Mrs. Hommer for all of the money, and she persisted in this demand until successful in 1974 in getting a relinquishment from her husband. A conversion of *her* funds could not have taken place until March of 1974.

The conviction, if sustained, must stand on speculation, conjecture, mathematical inaccuracies, prosecutorial shortcomings of proof, gilded over by the trial Court, coupled with a "mysterious ignoring" of this Court's decisions, and a recasting or *amending* of title 18 U. S. C. 1341 by the trial Court.

## Conclusion

The lower Courts in the instant case have made an unwarranted, unauthorized, and unreasonable judicial extension of 18 U.S.C. 1341 to dimensions never contemplated or intended by Congress and beyond the holdings of this Court in *Maze, Parr, Kann,* and *Sampson, supra,* and the other circuits.

The issuance of the writ would give this Court the first opportunity to resolve the conflict between the circuits in their interpretations of *Maze,* and to settle an important jurisdictional question.

Unless this Court exercises its power of intervention petitioner's conviction will be sustained to the prejudice of the cause of justice.

Respectfully submitted,

LAWRENCE R. ZEWE,
*Attorney for Petitioner.*

## APPENDIX A.

**Judgment Order.**

UNITED STATES COURT OF APPEALS

for the Third Circuit

---

No. 75-1048

---

UNITED STATES OF AMERICA,

v.

JAMES A. ASHTON,

*Appellant.*

---

(D. C. Crim. No. 74-258)

---

Appeal from the United States District Court
for the Western District of Pennsylvania

Argued September 2, 1975

Before VAN DUSEN, ADAMS and HUNTER,
*Circuit Judges*

Wendell G. Freeland, Esq., Pittsburgh, Pa., Attorney for Appellant.

Richard L. Thornburgh, U. S. Attorney; Samuel J. Orr, III, Assistant U. S. Attorney; Pittsburgh, Pa., Attorneys for Appellee.

After considering the contentions raised by appellant, namely,

(I) the Court, having granted appellant formal relief from prejudicial joinder of counts, erred by admitting thereafter the prejudicial testimony relating to the count severed and untried;

(II) the mailings which allegedly form the basis for federal jurisdiction are not sufficiently closely related to the alleged scheme to bring appellant's conduct within the mail fraud statute;[1]

(III) the evidence failed to establish beyond a reasonable doubt that Ashton converted money belonging to Mrs. Hommer; and

(IV) the trial Court erred in failing to sever the Watson counts from the Hommer counts;[2]

It is ADJUDGED AND ORDERED that the judgment of the district Court be and is hereby affirmed.[3]

BY THE COURT,
VAN DUSEN,
*Circuit Judge.*

Dated: Sep 5 1975

ATTEST:
THOMAS F. QUINN,
*Clerk.*

---

[1] See *United States v. Maze*, 414 U. S. 395, 403 (1974), and particularly p. 403, where *United States v. Sampson*, 371 U. S. 75 (1962), is cited with approval.

[2] See *United States v. Weber*, 437 F. 2d 327, 332 (3d Cir. 1970); *United States v. Klein*, 340 F. 2d 547, 548 (2d Cir. 1965).

[3] See *United States v. Ashton*, Opinion of December 14, 1974 (W. D. Pa., Crim. No. 74-258).

## APPENDIX B.

**Sur Petition for Rehearing.**

UNITED STATES COURT OF APPEALS

for the Third Circuit

---

No. 75-1048

---

UNITED STATES OF AMERICA,

v.

JAMES A. ASHTON,

*Appellant.*

---

(D. C. Crim. No. 74-258)

---

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ADAMS, GIBBONS, ROSENN, HUNTER, and GARTH, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court *in banc*, the petition for rehearing is denied.

BY THE COURT,
VAN DUSEN,
*Judge*.

Dated: Oct. 1 1975

## APPENDIX C.

**Motion for a New Trial.**

In the

UNITED STATES DISTRICT COURT

for the Western District of Pennsylvania

---

UNITED STATES OF AMERICA,

vs.

JAMES A. ASHTON,

*Defendant.*

---

No. 74-258 Criminal
18 U.S.C. Sections 402 and 1341

---

The defendant, James A. Ashton, by his attorney, Wendell G. Freeland, moves for a new trial for the following reasons:

1. The Court erred in failing to sever for purposes of trial counts 2 and 3 from counts 4, 5, 6, 7 and 8 as required by Rule 8 of the Federal Rules of Criminal Procedure.

2. The Court erred in failing to sever for purposes of trial Counts 2 and 3 from counts 4, 5, 6, 7 and 8 when it was apparent that consolidation of such counts would result in prejudice to the defendant's right to a fair trial.

3. The Court erred in ruling on the admissibility of evidence prejudicial to the defendant as follows:

a) In permitting, over objection, any reference by any witness, particularly Phyllis Arrigo, to an Order of Court in the Lipscomb case:

10. The Court improperly advised counsel for defendant that it was convinced that the motion for judgment of acquittal at the conclusion of the Government's evidence should be granted thus making more difficult the preparation for the rest of the trial.

11. The Court, in the presence of the jury, improperly inquired of counsel whether there were "objections" to its charge forcing counsel for the defendant to assert, in the presence of the jury, that there were, leading to an inference by the jurors that the Court favored the Government.

The defendant, having ordered a transcript of the charge of the Court, later colloquies on it and the questions of the answers to the jury, requests that the time for filing such other reasons for a new trial as may be revealed in a review of such extended for a period of ten days after such transcript is lodged by the Court Reporter.

Respectfully submitted,

WENDELL G. FREELAND,
*Attorney for Defendant.*

b) In permitting a copy of the Order of Court in the Lipscomb case to be an exhibit and to be given to the jury.

c) In permitting Handwriting Analyst Murray to give an opinion that any of the writing on the questionable documents was that of the defendant; and

d) In refusing to strike Murray's opinion when requested to do so.

4. The Court erred in submitting to the jury the question of a conversion of the funds in the Hommer settlement for the following reasons:

a) No conversion was shown by the evidence;

b) There was no evidence that Beatrice Hommer was entitled, as an individual, to the proceeds to the check of Home Insurance Company made payable to Beatrice Hommer, Jack Hommer and James Ashton.

5. The Court erred in refusing to charge the jury, as requested, that commingling of funds is not a crime.

6. The Court erred in denying the motion of the defendant for judgment of acquittal made at the conclusion of the Government's evidence and renewed at the conclusion of all the evidence.

7. The Court erred in failing, *sua sponte*, to admonish the Assistant United States Attorney for making improper statements to the jury in his closing remarks.

8. The Assistant United States Attorney made prejudicial and inflammatory remarks to the jury which were plain error.

9. The Court erred in failing to consider, under the circumstances, the requests of defendant of points for charge submitted before the lengthy closing argument of the prosecutor.

## APPENDIX D.

**Opinion and Order.**

In the

DISTRICT COURT OF THE UNITED STATES

for the Western District of Pennsylvania

---

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

JAMES A. ASHTON,

*Defendant.*

---

Criminal No. 74-258

---

Marsh, *Chief Judge*

James A. Ashton, a practicing attorney in Allegheny County, was convicted by a jury of two counts of mail fraud. He filed a "Motion for Arrest of Judgment" and a "Motion for a New Trial." In our opinion both motions should be denied.

The reason assigned in support of the motion for arrest of judgment states: "The indictment does not charge an offense against the United States under the applicable interpretation of the law." This reason was not supported by argument or authority. It is our opinion that each of the eight counts in the indictment adequately charges an offense against the United States, *i.e.*, Count 1, criminal contempt, 18 U.S.C. §402, and Counts 2 through 8, mail fraud, 18 U.S.C. §1341. The counts are briefly summarized as follows:

The first count alleged in substance that the defendant settled a wrongful death suit in favor of Mary Ellen Lipscomb, Executrix, for $75,000 before the Honorable Barron P. McCune, a judge of this Court, who distributed the proceeds, *inter alia,* to the widow Lipscomb and her two children and to the defendant, as attorney for the Executrix. A draft was issued payable to the Executrix and the defendant, her attorney, for the sum of $75,000 which was endorsed by the payees and deposited by the defendant in his name in a bank escrow account at the First National Bank and Trust Company of Washington, Pennsylvania. It was alleged that the defendant wilfully disobeyed the order of Court in that he ordered and received cashiers checks drawn on his escrow account containing the Lipscomb funds and made the cashiers checks payable to six persons not named as distributees in the court order for for distribution which disobedience constituted criminal contempt. After Judge McCune was advised of this alleged conversion, he called the defendant and a few days later defendant restored the Lipscomb funds. Among the six unauthorized persons to receive part of the Lipscomb funds by way of cashiers checks were Beatrice Hommer, $14,250, and Jack Hommer, $3,375.

The 2nd and 3rd counts charged the defendant with mail fraud in that he settled a personal injury action in favor of his client, Beatrice Hommer for $25,000 (GX30), but pursuant to a scheme to defraud and in violation of certain state statutes [1]prohibiting conversion, he falsely represented that the proceeds of the settlement which he received in January, 1972, were not available. Mrs. Hommer's share of the proceeds was not paid to her until March, 1974. In the meantime, the defendant mailed two checks to Mrs. Hommer, each for $2,500 (GX22 and GX23) ostensibly as advances or loans

[1]Title 18 Pa. Stat. Ann. §§4824, 4834, 3927 and 4113.

against the "expected" funds which he had deposited in his personal bank account. Retaining her funds for almost 26 months constituted a detriment to Mrs. Hommer. The March, 1974, payment to her, was made out of the funds converted from the Lipscomb estate mentioned in Count 1 (GX40).

Counts 4 through 8 charged the defendant with mail fraud in that he settled a personal injury case in favor of Henry E. and May Watson against two groups of defendants for $2,750 and $4,000 respectively in August and September, 1969, and, pursuant to a scheme to defraud and in violation of certain statutes [2]prohibiting conversion and forgery, he did not pay the proceeds of the settlement to the Watsons until March, 1970. The indictment alleged that the endorsements of the Watsons on the checks and releases were forged. Five articles of mail matter were mailed by representatives of the insurance companies involved in effecting the settlements of the Watson claims.

Upon defendant's pretrial motion, Count 1 was severed and the prosecution elected to proceed to trial on the mail fraud counts.

The jury found the defendant guilty of Counts 2 and 3, and found him not guilty of Counts 4 through 8. Thereafter, upon motion of the Government, Count 1 was dismissed.

The defendant's pretrial motion to dismiss the indictment was denied.

The defendant's pretrial motion to strike paragraphs 2, 3, and 4 of Counts 2 and 3, and paragraphs 3 and 4 of Counts 4 through 8 was granted.

---

[2] Title 18 Pa. Stat. Ann. §§4824, 4834, and 5014.

I

In his motion for a new trial (reasons 1 and 2) the defendant asserts error in that Counts 2 and 3 were not severed from Counts 4 through 8. He cites Rule 8, Fed. R. Crim. P.[3]

Counts 2 through 8 charge violations of the mail fraud statute, 18 U.S.C. §1341. They are crimes of similar character which may be joined under Rule 8 (a). The defendant's burden of showing prejudice under Rule 14, Fed. R. Crim. P. was not met prior to or during the trial. The fact that the jury was able to distinguish between the counts, finding defendant guilty of Counts 2 and 3 involving the Hommer conversion and mail frauds, and finding defendant not guilty as to Counts 4 through 8, involving the Watson conversion and mail frauds aided by forgeries, is strongly indicative that there was insufficient prejudice to have justified separate trials under Rule 14, Fed. R. Crim. P. Obviously, the evidence of guilt as to Counts 2 and 3 was not used by the jury to carry over or infer guilt as to Counts 4 through 8 upon which the defendant was found not guilty. *United States v. Hatcher,* 423 F. 2d 1086 (5th Cir. 1970). See also, *United States v. Tillman,* 470 F. 2d 142 (3rd Cir. 1972). The fact that 2 1/2 years separated the Hommer conversion from the Watson conversion is insufficient in itself to show prejudice resulting from refusal to sever Counts 2 and 3 from Counts 4 through 8, *United States v. Hatcher, supra,* at 1089. Common to all counts was the defendant's alleged scheme to conceal the receipt of his clients' money, his conversion of those funds, and use of the mails as essential parts of the scheme. Cf. *United States v. Weber,* 437 F. 2d 327 (3rd Cir. 1970).

[3] Rule 8 Fed. R. Crim. P. in part provides:

"(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character. . ."

II.

Reason 3 complains of evidential rulings. The order of Court in the Lipscomb case (GX38) was relevant to show the 1974 source of the funds from which the defendant, after 26 months paid the proceeds of the settlement to Mrs. Hommer and her husband, Jack Hommer. The defendant's disobedience of that order, as shown by Miss Arrigo's testimony, was evidence of his continuing intent to convert money of one client to pay another; it was also corroborative of the fact that he had converted to his own use the Hommer money which he had received in January, 1972, and deposited in another bank. See III *infra.*

The rulings on the admissibility of opinions of the handwriting expert which related solely to the alleged Watson conversion and forgeries, even if erroneous, would not warrant a new trial for the jury found the defendant not guilty of the 5 charges of mail fraud involving the Watson, *i.e.*, Counts 4 through 8.

III.

Reason 4 asserts error in submitting to the jury the question of a conversion of funds in the Hommer settlement. There was ample evidence that the defendant converted these funds.

Upon receipt of the two checks from the insurance company (GX30 and GX31) totalling $33,155.57, the defendant deposited them in his personal bank account in Western Pennsylvania National Bank on January 21, 1972. Immediately prior to this deposit the balance in his account was $1,793.98 (See January 25th bank statement, GX37). From January 21 thru January 25, 1972, the defendant drew 16 checks on this account totalling $13,788.02 leaving a balance at the close of business on January 25, of $21,161.53. At most, the defendant

was entitled to a 25% contingent fee[4] in the amount of $8,288.89 which would leave the amount due the Hommers of $24,866.68. Obviously, he converted part of their money.

Moreover, the defendant did not pay the Hommers their respective shares of the settlement until March, 1974, nearly 26 months later, when he secured cashiers checks payable to the Hommers in the total amount of $17,625 (GX40), from the First National Bank and Trust Company of Washington, Pennsylvania, which amount was converted from the funds belonging to the Lipscomb Estate. See allegation in Indictment, paragraph 16, Counts 2 and 3.

Despite defendant's argument that there may have been outstanding expenses, none were proved. There was no valid explanation of the 26-month delay in paying to Beatrice Hommer the money to which she was entitled in January, 1972, which in itself is strongly circumstantial evidence of conversion.[5]

The defendant was obligated to pay Mr. and Mrs. Hommer $24,866.68, the settlement money due to both, less his fee, in January, 1972. The fact that several months later the Hommers experienced marital difficulties prompting Mr. Hommer to tell his laywer that he refused to "sign anything" does not justify the conversion. If the defendant had promptly sent a check payable to Beatrice Hommer and Jack Hommer, her husband, for the net proceeds of the settlement, which was his duty as their lawyers, a charge of conversion would have been forestalled. Instead he kept Mrs. Hommer's money, to her detriment, for almost 26 months before remitting the proceeds, without interest. The fact that he mailed two checks

---

[4] On cross-examination, Mrs. Hommer testified that according to her agreement with the defendant, he was to receive a fee of 25% if the case settle out of court.

[5] Commonwealth v. Spiegel, 82 A. 2d. 692, 196 Pa. Super. 252 (1951).

to her in the meantime, each the sum of $2,500, apparently to hide the fact that he had long since received her money, constituted a part of the scheme to convert her funds and justified submitting the mail fraud charges to the jury.

IV

Reasons 5, 6, 7, 8, 9, 10 and 11 are not worthy of extended consideration. Reasons 7 through 11 were neither briefed nor argued by the defendant.

There was ample evidence to warrant the verdicts of guilty upon Counts 2 and 3 (See III, *supra*).

The remarks of the Assistant United States Attorney were not objected to, and even if improper under the evidence, which is doubtful, they were not sufficiently prejudicial to justify a new trial.

The defendant's points for charge, handed to the Court after the defendant's summation had been concluded[6] were untimely.[7] Rule 30 Fed. R. Crim. P. requires that points for charge be presented to the Court at the close of the evidence and prior to arguments of counsel.

There was not testimony, argument, or accusation proffered by the prosecution that commingly funds was a crime. The oral request for an instruction that commingling was not a crime after the charge was concluded (Tr. Vol. I p. 53) was

---

[6] The defendant's summation was concluded in the morning of October 23rd and his handwritten points for charge were filed at 1:50 p.m. o'clock just prior to the prosecutor's summation.

[7] *Cf.* United States v. Tourine, 428 F. 2d 865, 868-869 (2nd Cir. 1970); Lewis v. United States, 153 F. 2d 724, 726 (8th Cir. 1946); Wright, Fed. Prac. & Procedure §482, p. 276.

untimely.[8] In any event, the request had no relevance to the case.

The Court denied the defendant's motion for judgment of acquittal made at the conclusion of the Government's evidence (Tr. Vol. III p. 58); and denied the defendant's motion for judgment of acquittal made at the conclusion of all the evidence (Tr. Vol. III p. 63).

It was not improper for the Court at the conclusion of the charge to inquire whether anything was to be corrected.

In response, defendant's counsel cryptically stated: "I think we should have some opportunity to discuss it . . ." The Court inquired if he had any objection. Upon receiving an affirmative reply, the jury was excused and counsel proceeded to make his objections (Tr. Vol. I p. 51). We think the 11th reason for a new trial is frivolous.[9]

An appropriate order will be entered.

. . . . . ,

*United States District Judge.*

---

[8] United States v. Bailey, 451 F. 2d 181, 183 (3rd Cir. 1971); United States v. Kahaner, 317 F. 2d 459, 577 (2nd Cir. 1963).

[9] Rule 30, Fed. R. Crim. P. *Cf.* Nolan v. Bailey, 254 F. 2d 638, 640 (7th Cir. 1958) and Lambert v. Duzy, 286 F. Supp. 670, 673 (E. D. Pa. 1968) which interpreted Rule 51, Fed. R Civ. P., a rule almost identical to Rule 30 Fed. R. Crim. P.

*ORDER OF COURT*

AND NOW, to-wit, this 19th day of December, 1974, after oral argument and upon due consideration of the briefs, IT IS ORDERED, ADJUDGED AND DECREED that the motion for arrest of judgment and the motion for a new trial filed by the defendant, James A. Ashton, be and the same hereby are denied.

IT IS FURTHER ORDERED that the defendant shall appear for sentence on the 30th day of December, 1974 at 2:00 p.m. in Courtroom No. 1, United States Courthouse, Pittsburgh, Pennsylvania.

.....,
*United States District Judge.*

cc:

Samuel J. Orr, III
Assistant United States Attorney
633 U. S. Courthouse
Pittsburgh, PA 15219

Wendell G. Freeland, Esquire
500 Manor Building
Pittsburgh, PA 15219

James A. Ashton
c/o Wendell G. Freeland, Esquire
500 Manor Building
Pittsburgh, PA 15219

## APPENDIX E.

### Indictment.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

---

UNITED STATES OF AMERICA,

v.

JAMES A. ASHTON.

---

No. 74-258 Criminal

(18 U.S.C., Sections 402 & 1341)

---

* * *

*COUNTS 2-3*

The grand jury further charges:

5. From January 21, 1972 through June 5, 1973, Title 18, Purdon's Pennsylvania Statutes Annotated, Sections 4824 and 4834, were in effect and in pertinent part provided as follows:

> "*4824. Embezzlement by bankers, brokers, etc.*
>
> Whoever, being a banker, broker, attorney, merchant or agent, and being intrusted for safe custody, with the property of any other person, and, with intent to defraud sells, negotiates, transfers, pledges, or in any manner converts or appropriates to or for his own use or the use of any other person, such property, or any part thereof, is guilty of embezzlement, a felony.

*4834. Fraudulent conversion of property*

Whoever, having received or having possession, in any capacity or by any means, or manner, of any money or property, of any kind whatsoever, of or belonging to any other person, or which any other person is entitled to receive and have, fraudulently withholds, converts, or applies the same, or any part thereof, or the proceeds or any part of the proceeds, derived from the sale or other disposition thereof, to and for his own use and benefit, or to and for the use and benefit of any other person, is guilty of a felony . . ."

6. From June 6, 1973 through the date of this indictment, Title 18, Purdon's Consolidated Pennsylvania Statutes Annotated, Sections 3927 and 4113, were in effect and in pertinent part provide as follows:

*"3927. Theft by failure to make required disposition of funds received*

(a) Offense defined. A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.

*4113. Misapplication of entrusted property and property of government or financial institutions*

(a) Offense defined. A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a

financial institution, in the manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted."

7. Beginning on or about the 21st day of January, 1972, and continuing to on or about the 8th day of March, 1974, at Pittsburgh, in the Western District of Pennsylvania, the defendant JAMES A. ASHTON devised and intended to devise a scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses, representations and promises, from Beatrice Hommer, who was induced to believe that she could not receive any money from the settlement of an automobile accident in which she sustained bodily injuries until final settlement with all other parties, and the defendant JAMES A. ASHTON well knew that those pretenses, representations and promises were false when made and which scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises so devised and intended to be devised by the defendant JAMES A. ASHTON was in substance as follows:

8. It was part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON represented Beatrice Hommer as a client-plaintiff in a lawsuit involving an automobile accident in which the plaintiff, Beatrice Hommer, suffered bodily injuries.

9. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON compromised a lawsuit between Beatrice Hommer and obtained her signature on the Release of Liability form.

10. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON received the check from the insurance company which agreed to pay the defendant JAMES A. ASHTON's client, Beatrice Hommer,

money for the injuries she had sustained in the automobile accident.

11. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON endorsed the check payable to him and his client, Beatrice Hommer, and deposited the money in an account in his name.

12. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON advised his client that she could not receive her money from the accident until all other parties involved had settled their claims, when the defendant JAMES A. ASHTON knew well that Beatrice Hommer was entitled to her money upon receipt by the defendant JAMES A. ASHTON of the check from the insurance company.

13. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON told Beatrice Hommer that he would loan sums of money to her until said case was settled.

14. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON did forward money to Beatrice Hommer after the compromise of the lawsuit and did assert that it was a loan from his rather than that to which she was entitled.

15. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON converted the money received from the settlement to his own use and to the use of others, in violation of the laws of the Commonwealth of Pennsylvania.

16. It was further a part of the scheme and artifice to defraud that the defendant JAMES A. ASHTON would settle the lawsuits of his other clients and would then convert those

funds for use in paying Beatrice Hommer the money which he previously owed her.

17. On or about the dates listed below, in the Western District of Pennsylvania, JAMES A. ASHTON, defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly and wilfully:

Placed and caused to be placed the letters listed below in the United States mails to be sent and delivered according to the directions thereon by the Postal Service of the United States, each such use being a separate count of this indictment:

| *Count* | *Sender* | *Addressee* | *Date of Mailing On or About* |
|---|---|---|---|
| 2 | James A. Ashton | Beatrice Hommer<br>1210 Madison Avenue<br>Apartment 1<br>Altoona, Pennsylvania | November 2, 1972 |
| 3 | James A. Ashton | Beatrice Hommer<br>1210 Madison Avenue<br>Apartment 1<br>Altoona, Pennsylvania | January 4, 1973 |

All in violation of Title 18, United States Code, Section 1341.

* * *

## APPENDIX F.

### Testimony of Beatrice L. Hommer.

* * *

BEATRICE L. HOMMER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Orr:

Q. Your name, please?

A. Beatrice Hommer.

Q. And where do you live, Mrs. Hommer?

A. At the present time I live in Hollidaysburg, Pennsylvania.

Q. You will have to speak up just a little bit so everyone can hear you. Back here it is a little hard.

A. At present—

Mr. Freeland: Excuse me. I am not so sure. Maybe if the mike would be a little louder.

The Witness: I am not used to speaking in them.

Mr. Freeland: We will do something with them.

A. (Continuing) At the present time, I live in Hollidaysburg, Pennsylvania.

Q. Do you know the defendant in this case, James Ashton?

A. Yes, I do.

Q. Did he represent you in any cases in the past?

A. Yes, in a car accident.

Q. Pursuant to that, did you receive any letters in the mails?

A. I beg your pardon?

Q. Pursuant to that accident, did you receive any letters in the mail at all relating to this matter?

A. Yes.

(Whereupon, Government's Exhibits Nos. 22 and 23 were marked for identification.)

Q. At this time, Mrs. Hommer, I am going to show you what has been marked as Government's Exhibit No. 22, and without indicating what the contents are, can you identify what it is and approximately when you would have received it?

A. Well, yes, I received it, well, it was mailed or written November the 2nd. I probably got it the 3rd or 4th.

Q. Do you recall receiving that letter?

A. Yes, I do.

Q. Did you receive it—By what medium did you receive it?

A. In the mail.

Mr. Orr: At this time, Your Honor, we would move into evidence Government Exhibit No. 22.

Mr. Freeland: No objection.

The Court: Let it be admitted.

(Whereupon, Government's Exhibit No. 22, having been previously marked for identification, was admitted into evidence.)

Q. Now, of course, you don't, you're not a handwriting expert, and we are not purporting to ask you whether or not that in fact is Mr. Ashton's signature, but I just ask you on that exhibit is there a signature purportedly of James A. Ashton?

A. Yes, there is.

Q. I show you what's been marked as Government Exhibit No. 23, and I ask whether or not you recognize that particular exhibit?

A. Yes, I do.

Q. You will have to speak up just a little bit, because I can tell the jurors in the back can't hear you.

A. Yes.

Q. And do you recall approximately when you would have received that particular letter?

A. Well, it was mailed January the 4th. I probably received it the 5th or 6th.

Q. And you indicated this arrived to you in the United States mails?

A. Yes.

The Court: Maybe she could give us the year.

The Witness: Well, they're dated November the 2nd of 1972 and January the 4th of '73.

Mr. Orr: Okay. At this time, Your Honor, we would move into evidence Government's Exhibit No. 23.

Mr. Freeland: We have no objection.

The Court: Let it be admitted.

(Whereupon, Government's Exhibit No. 23, having been previously marked for identification, was admitted into evidence.)

By Mr. Orr:

Q. On Government Exhibit 23, Mrs. Hommer, is there a signature at the bottom which purports to be that of James A. Ashton?

A. Yes, there is.

Mr. Orr: Cross examine.

Mr. Freeland: May I see them again, Mr. Orr, please?

Cross Examination

By Mr. Freeland:

Q. And both of these letters, Mrs. Hommer, were sent to Altoona, Pennsylvania.

A. That's where I lived at that time.

Q. Right. A check in the sum of $2500 was enclosed, is that right?

A. That's right.

Q. Had you requested that Mr. Ashton mail to you a certified check just prior to November 2nd, 1972?

A. Yes. I asked for some money. I was pretty desperate at that time.

Q. Now, did you talk to him or did you talk to Tracy Newmyer, the secretary?

A. No, I talked with Mr. Ashton.

Q. Mr. Ashton?

A. I have never heard of Tracy Newmyer.

Q. A girl, I don't know if it is Tracy.

A. Oh, is that the secretary? No, I spoke with Mr. Ashton.

Q. Okay. I think it is, but I will worry about it, but you called from Altoona or did you call from Pittsburgh?

A. I called from Altoona.

Q. And were there other occasions when you came to Pittsburgh to Mr. Ashton's office for any purpose whatsoever?

A. Yes. Several times.

Q. Now, in connection with Government Exhibit 23, which is the letter of January 4, 1973, you have indicated—in fact, this was sent registered mail, return receipt requested?

A. That's right.

Q. And there was a check enclosed, also, is that right, $2500?

A. That's right. $2500.

Q. And had you called Mr. Ashton and asked him to mail you another check?

A. Yes, I did. There was illness in my family. I needed it badly.

Q. Right. But you didn't come down to Pittsburgh? You said please send me by the next mail or as soon as possible?

A. I beg your pardon. I came to Pittsburgh?

Q. No, I said you did not come to Pittsburgh.

A. No.

Q. You just called him and said please send me as soon as possible, or words to that effect, some money?

A. I said, "Will you please try to get my case settled as fast as possible and get me some money? I need it desperately."

Q. All right. But you did request money and that he send you some money?

A. I said I was desperate for money, which I was at the time.

Q. I understand. I understand that, but I am just trying to—Did you ask him to send you some, just yes or no, if you remember?

A. I don't recall. I do recall I said, "Get anything. I need it desperately." And he, I believe, Mr. Ashton, I don't recall, it has been so long, but I believe he said he would send me—

The Court: I may not have heard you. You think he said I will send you what?

The Witness: I believe he said—Now, I don't recall completely, but it seems to me he said, "I'll get a check off to you. I'll send you some to tide you over. Will it help?"

I believe that was the words.

By Mr. Freeland:

Q. In either of the instances, Mrs. Hommer, in November of '72 and January of '73, in either of the instances, did you suggest that you would come down to Pittsburgh to pick it up?

A. I don't recall.

Q. Do you recall whether Mr. Ashton suggested that you come down to Pittsburgh and pick it up?

A. I don't recall that. At that time I was having an awful lot of trouble.

*Appendix F—Testimony of Beatrice L. Hommer, Recalled—Direct.*

Q. Now, on the occasions when you did come to Pittsburgh to Mr. Ashton's office, did you drive?

A. Yes.

Q. Or were you driven?

A. Well, I was driven in once. I was driven in twice, and then, I drove once or twice myself.

Q. And how long does it take to get from Altoona where you lived to Mr. Ashton's?

A. About two and a half hours.

Q. I am sorry.

A. About two and a half hours.

Q. Okay. And it is your recollection that you probably received both of those mailings a couple of days after the mailings were dated, is that your best recollection?

A. Usually it takes one or two days. That's what I was going by.

Q. We haven't improved the system very much, have we?

A. No, they haven't.

Mr. Freeland: All right, that's all.

Mr. Orr: I have no further questions at this time. The witness is not excused because she will be recalled at a later time. That's all for now.

(Witness excused.)

---

BEATRICE L. HOMMER, recalled as a witness on behalf of the plaintiff, resumed the stand and further testified as follows:

Further Direct Examination:

By Mr. Orr:

Q. Your name, please?

A. Beatrice Hommer.

*Appendix F—Testimony of Beatrice L. Hommer, Recalled—Direct.*

Q. You will have to speak up just a little.

A. Beatrice Hommer.

Q. And you indicated when you were previously sworn, but for the benefit of the jury, where do you presently live?

A. Hollidaysburg, Pennsylvania.

Q. For how long a period of time have you resided there?

A. Not quite two years.

Q. And what is your marital status at this time?

A. My husband and I are separated.

Q. At the present time are there any divorce actions pending on either party's side?

A. No.

Q. Do you know the defendant, Mr. Ashton?

A. Yes.

Q. When did you first come in contact with Mr. Ashton?

A. Back in '72, the first part of '72, I believe it was.

Q. And what occurred in '72 that would have caused you to seek legal help?

A. I had been involved in a very serious accident in February of '70. I believe it was '71 I came in contact with Mr. Ashton, and I had to have an attorney to represent me.

Q. Where did this accident occur?

A. Hope, Arkansas.

Mr. Freeland: Mr. Orr, I am having just a little bit of trouble hearing her. Maybe if that—I know you have—You know it is not easy.

The Witness: Let me get readjusted here. Okay. In Hope, Arkansas.

Mr. Freeland: Thank you.

By Mr. Orr:

Q. Now, when you retained Mr. Ashton, did you give him any retainer?

A. Yes. $500 retainer fee.

Q. Did he tell you at that time approximately how long it would be before a settlement was made or couldn't he tell at that time?

A. No. I had first retained F. Lee Bailey, and had to discharge him due to his not doing anything. Mr. Ashton didn't know how long it would take.

Q. How may possible defendants were there in this particular case? In other words, was this a multi-party action, or were there just you and your husband suing somebody else?

A. My husband and I were suing the City of Hope. It was a city dump truck, and then we were suing the Pacattes, a couple that was supposed to have pulled out in front of the truck, causing the truck to put on its brakes and come over into our car.

Q. In fact, is that action still pending and unsettled?

A. The Pacatte case is, yes.

Q. As time went by, did you have occasion at any time to contact Mr. Ashton to find out what the status of your case was?

A. Oh, yes. I was in pretty constant contact with him.

Q. And did he tell you anything about what was happening?

A. They were pending. They were going to be settled. I went through several physical examinations for the records.

Q. At any time did you and your husband give Mr. Ashton authority to settle a portion of the case?

A. I believe we did.

Q. And do you recall approximately when that would have been?

A. Well, it was some time the end of '71 or first part of '72.

Q. And what was it that was your understanding that you had agreed to?

A. Well, the City of Hope was just insured for twenty-five and fifty.

There was no doubt the full twenty-five was mine, because I am permanently injured from it, and I think my husband was to get $4,000, and so that we agreed to take that amount.

Q. Did Mr. Ashton say when you would get paid?

A. No. We signed some papers he sent to us. I am trying to recollect. That's been a long time ago. We did sign some papers and the letter that he wrote us with them said that my getting the full amount, there was no doubt, and my husband getting the $4,000, and he would advise us to take it, and being our attorney, well, we took his advice.

Q. But did he tell you when you would actually come into possession of the cash?

A. No. My understanding and apparently—

Mr. Freeland: I am going to object at this time, Your Honor, to the witness' understanding unless it is really the result of a conversation, we get the conversation in.

I mean, I have no objection to the conversation.

The Court: Just what he said, Mrs. Hommer, if you can remember.

The Witness: Everything would be settled at the same time. I would get all of the money at the same time, the Pacatte money and the City of Hope.

Q. Did you at any time after you had agreed to settle at least with the city, did you at any time then question Mr. Ashton as to when your money would be coming or whether or not you could get part of it?

A. Yes. I kept wanting to know when it was going to be settled, and I was getting to the point I was willing to take anything.

Q. And why was that?

A. Well, my husband and I separated, and illness and quite a few other things.

Q. Was there any illness of an immediate family member?

A. My mother.

Q. What was that problem at that time?

A. She is a cancer patient.

Q. Were you able to get hold of Mr. Ashton by phone at any time?

A. Yes. I talked to Mr. Ashton.

Q. What would he tell you, if you remember?

Mr. Freeland: Your Honor, could we have to the best of the witness' recollection the approximate times of the conversations?

The Court: You can certainly cross examine her on that, but bring out the times.

A. Well, I called quite frequently. As far as the dates, I don't know, I would have to go back over my phone bills.

Q. What did he tell you?

A. Well, he was very encouraging that the situation would be settled, and he was working on it.

Q. Was this after February of 1972 when he said he was working on it?

A. Oh, yes.

Q. Did you at any time prior to March of 1974 receive any money?

A. Yes, I did.

Q. And can you tell us how it was that you were able to get money from Mr. Ashton?

A. Well, Mr. Ashton realized that I was in pretty dire circumstances. I mean, I was needing it badly, and twice he sent me checks for $2500, two different times.

Q. Now, did he tell you over the phone why he was giving you these checks and what the legal understanding of that would be?

A. No. I don't believe. I don't believe that ever came up. I was very emotionally upset, and with—I was crying several times there, and he asked if the $2500 would help, he would get it off the next day.

Q. In 1974, in late February and early March, did you go to Mr. Ashton's office?

A. In late February and early March?

Q. In late February or early March?

A. Of this year?

Q. Yes, 1974.

A. Yes, I did.

Q. Can you tell us what the circumstances of that was?

A. I went in to get my check. I had received a letter, a copy of a letter from Mr. Price, an attorney in Arkansas, a copy of a letter he had sent to Mr. Ashton, which upset me terribly, and I got on the phone and called the Home Insurance Company and called quite a few places and found out that it had been settled.

Q. Was that the reason that you went to Mr. Ashton's office?

A. Yes, sir.

Q. Do you recall the approximate date that that would have been that you would have gone to his office?

A. I believe it was around the 4th or 5th, 6th of March.

Q. Did you call him before you went in?

A. Yes, I called the day before.

Q. And did you get a chance to talk to Mr. Ashton?

A. Yes, I did.

Q. And, first of all, what did you tell him?

A. Well, I was angry, and I just said that I wanted my money.

Q. What did he say?

A. He said when did I want it, and I said, "Yesterday." I was being nasty. And he had said could I be in his office the next day at one o'clock or 1:30, I have forgotten which.

Q. Did you go there the next day?

A. Yes, I did.

Q. Did you receive a check?

A. Yes, I did.

Q. And what was the amount of that check?

A. $14,250 for me and $3,300 and something for my husband.

Q. Prior to you receiving the $14,250 check, did you at any time receive an offer from Mr. Ashton for a lesser amount?

A. Yes. When I talked with him the day before, some way the figure $11,600 some odd came up, and it didn't correspond with my figures, with the deduction of his fees and all, less the $500 retainer I had given him.

Q. Did you, prior to receiving the offer for $11,600 mention anything about a bar association?

A. No, I didn't.

Q. What were the circumstances? What did Mr. Ashton say? How did you get into the $11,666 figure?

A. Well, Mr. Ashton came up with that, and, as I said, I was very, very angry, and I said no way, that there was some error in his calculation or my calculation.

And I told him the figure I had arrived at, the $14,250, and then I believe Mr. Ashton called my husband and my husband also had the same figures.

Q. Mrs. Hommer, I am going to show you Government's Exhibit 22, which has previously been identified and admitted, and I ask you whether or not you recognize that letter.

A. Yes. This came with one of the checks, the $2,500.

Q. And I show you Government Exhibit No. 23 and I ask you whether or not you recognize that?

A. Yes.

Q. Can you tell us what that is?

A. Well, this is the second check, one of them.

Q. For $2500?

A. Yes, January, this $2500 check; November the 2nd of '72, and then January the 4th was the second check of '73.

Q. And then you received nothing until March of 1974, is that correct?

A. That's right.

Q. Mrs. Hommer, I am going to show you Government Exhibit 28, which is a two-page document, and I ask you to look at the second page of that document.

Before you say anything about that, I will ask you whether or not you recognize your husband John H. Hommer's signature?

I mean, do you know the signature generally, Mr. Hommer's signature?

A. Yes, I—

Q. How many years were you married?

A. Twenty-four, and we lived together twenty-four. We have been married twenty-six now.

Q. And I ask you to look on Government Exhibit No. 28 and tell us whether or not, based on your knowledge of Mr. Hommer's signature, that that is or is not his signature?

A. No, I am quite sure that isn't his signature.

Mr. Freeland: What exhibit is that, Mr. Orr?

Mr. Orr: 28.

Mr. Freeland: 28.

Q. I show you what's been marked as Government Exhibit No. 29, and I would request that you turn to the second page

of that document, and I note on there that there is a signature, Beatrice Hommer and John H. Hommer.

Now, first of all, I will ask, is that your signature?

A. Definitely not.

Q. Is that Mr. Hommer's signature?

A. No.

Q. I show you Government Exhibit No. 30 which is the check from the Home Insurance Company for $25,000 payable to James Ashton and John H. and Beatrice Hommer, husband and wife.

Of course, on the back that particular signature doesn't even purport to be your signature, but I again will ask you is that your signature or your husband's?

A. No, sir.

Q. And I show you now Government Exhibit No. 31, which is a check payable to John H. Hommer and James Ashton, Attorney, for $8155.57, and I ask you to look at that and tell us whether or not that's Mr. Hommer's signature?

Mr. Freeland: Your Honor, I am going to object to—If Mr. Orr will use the same preface—

A. No.

Q. It does not purport to be—It is not a forgery, is that correct?

A. It is not my husband's.

The Court: Wait. What is this Government Exhibit 31? What is it?

Mr. Orr: Well, it is a check, Your Honor. What Mr. Freeland is objecting to, it is merely more, it is something he could bring out on cross examination.

We do not claim that these checks are forgeries. They don't purport to be signed by the Hommers.

They're signed by John H. Hommer by his attorney, James Ashton.

The Court: I would like to know what it was. It is a check?

Mr. Orr: Yes.

The Court: For how much?

Mr. Orr: Government Exhibit No. 30 is a check for $25,000. Government Exhibit 31 is a check for $8155.57.

Q. I show you now Government Exhibit 40, which is a copy of two cashier's checks drawn on the First National Bank and Trust Company of Washington, Pennsylvania, dated, one, March 6, 1974 in the amount of $14,250, one, and that's payable to Beatrice Hommer, and the other, a cashier's check drawn on the same bank is payable to Jack Hommer for $3375, and I ask you to look at those particular checks and tell us whether or not you have seen those before, recognizing that they're copies?

A. Yes.

Q. And can you tell us where you have seen those?

A. These were the two checks Mr. Ashton gave me when I came in in March.

Q. March of 1974?

A. Yes.

Mr. Orr: Cross examine.

Cross Examination

By Mr. Freeland:

Q. Mrs. Hommer, am I correct that after you—I am going to come over here so you can—

A. Yes, please do, and I can hear you better.

Q. Right. Am I correct in saying that after you went to Mr. Ashton's office in March of 1974 and received the check,

I think it was a check, Government Exhibit No. 40, which was for $14,000 plus, that you and your husband went with Mr. Ashton to have depositions taken in connection with the other part of the case?

A. In between the time I had talked to Mr. Ashton the day before and the time I arrived at his office the next day, he had made arrangements for the trip to St. Louis for depositions and got Mr. Price back on the case, yes.

Q. I think you looked at Government's Exhibits 28 and 29 and indicated—and those are—I am going to give them to you, I'm sorry, so you will know exactly what I'm talking about.

These are what I suppose we call purported releases, Government's Exhibits 28 and 29.

A. Yes.

Q. And I think you indicated that as a matter of your opinion and as a matter of fact the signatures which appear on the second pages of both of those exhibits are not yours or your husband's?

A. That's true, they aren't.

Q. But you do recall signing pieces of paper which were releases or purported to be releases in connection with your receiving $25,000 from Home Insurance on behalf of Hope, Arkansas and that your husband signed something in connection with that also? Do you recall that?

A. Yes, I do.

Q. All right.

A. To the best of my recollection, the ones we signed, I see here my husband's says $8,155.57. I never saw those figures, and, according to my husband, he didn't either. He saw $4,000.

Q. Well, let me just ask you something.

Mr. Freeland: I don't know what they are by now. I'll rely upon you.

The Clerk: L and M.

Mr. Freeland: L and M. That's pretty good.

(Whereupon, Defendant's Exhibits L and M were marked for identification.)

Q. Now, I'm going to show you two pieces of paper. Here, I will take 28 and 29 back, but I will leave them right there, and I will give you what's now marked Defendant's Exhibit No. L and ask you, one, to look at it; two, to look at the second page of it.

All right. Do you know what it is?

A. It is a release.

Q. Now, I am going to ask you to look at Defendant's Exhibit No. M and ask you to look at both pages, particularly the writings on the second page.

A. Yes.

Q. All right. Would you look at the second page?

A. Yes.

Q. All right. Now, can you tell us what that is?

A. That is a release. This is the one my husband and I signed.

Q. All right. Now, on Defendant's Exhibit M, let's go first to M, which is the one both of you signed.

A. This one here.

Q. All right. Now, is that one signed by you and signed by your husband?

A. Yes.

Q. All right. Now, can you tell us what is it?

A. It is a release, the release in the full amount of $25,000 that I was to receive.

Q. All right. Now, I show you now Defendant's Exhibit

No. L and ask you to look at the writing on the bottom of the second page and do you know, can you tell us what that is?

A. That is my husband's signature.

Q. All right. Now, Mrs. Hommer, what is the entire two pieces of paper marked Defendant's Exhibit No. L, do you know?

A. Beg pardon? What is what?

Q. What are the two pieces of paper together? You say it is his signature on the second page.

A. They're a release.

Q. All right. And what's that for?

A. This one is in the amount of $8,155.57. I was just relooking at this signature.

Q. Take your time.

A. I couldn't swear that that is my husband's signature. It is quite similar.

Q. Okay. Now, let me just ask you this:

Mr. Orr: Excuse me, Mr. Freeland. Do you want to move that in? I have no objection.

Mr. Freeland: Oh, I'm sorry, Mr. Orr. Yes, I do move L and M. I have forgotten.

The Court: What are you talking about?

Mr. Freeland: I move for the admission of Defendant's Exhibits L and M, which this witness has identified as having been seen by her before and—

The Witness: I said—Excuse me.

Mr. Orr: I have no objection, Your Honor.

The Witness: This one I definitely know I saw. I signed it.

The Court: Well, Defendant's Exhibits L and M are admitted in evidence.

The Witness: And this one, I don't know if I saw it

before, and, as I say, I wouldn't say that is my husband's signature.

(Whereupon, Defendant's Exhibits L and M, having been previously marked for identification, were admitted into evidence.)

By Mr. Freeland:

Q. Okay. Now, would you just take a few minutes and look at L and M and Exhibits 28 and 29 for the government and see if there are any other than the signatures which appear on pages the second of each, whether there are any differences in the text material or the typed material?

Mr. Orr: Incidentally, Mr. Freeland, I assume that you're admitting and vouching that it is Mr. Ashton's signature as a witness on the Hommer documents L and M.

Mr. Freeland: I offer them as exhibits for the—We will get to that, I am sure. I do not, if that's a question for the record.

The Court: I don't think counsel should engage in colloquy. If there are any objections, make them to the Court.

A. I see no differences.

Q. Now, Mrs. Hommer, to recapitulate, you were in an accident in Hope, Arkansas?

A. That's right.

Q. And you were very badly injured in that accident.

A. That's true.

Q. Was you husband in the car?

A. He was driving. It was my car.

Q. He was driving, and you originally went to F. Lee Bailey and thereafter you—

A. I didn't go to F. Lee Bailey. I was laid up. He came to me.

Q. Oh, okay, and you paid him, I believe, a retainer, and then—

A. Of $2500.

Q. Right. And he was supposed to resolve the problem of your claim against whoever was responsible for the accident, is that correct?

A. That's true.

Q. And you were not satisfied and eventually at some time or the other you talked to Mr. Ashton about it, and some time after that he advised you that the City of Hope, Arkansas, which had a truck involved in the accident, had an insurance policy which had, you said, twenty-five and fifty limits.

Now, that meant to you at that time that you from that defendant, the City of Hope, and its insured or at least from its insurance company you could get $25,000 tops, is that right?

A. That I could, yes.

Q. And because you were in fact seriously injured, you felt and Mr. Ashton felt that you should get the actual limits of the policy and more if there were other policies, is that right?

A. Well, there was no doubt about my getting the full amount.

Q. Right. And then you, there was another vehicle or someone else involved.

A. The Pacattes.

Q. Causing you the injuries, is that not right?

A. I don't know. I didn't see the accident. I was looking at a map, but the Pacattes were supposed to have been driving a camper and pulled out of a little country store in front of the

truck or something, making him throw on his brakes and into our car.

Q. And then your lawsuit or your claim was against the City of Hope, Arkansas?

A. Which is insured by the Home Insurance Company.

Q. Insured by Home Insurance Company, and the Cattes or Macattes—

A. Pacattes.

Q. Pacattes. I am sorry. And the Pacattes, and then in late '71 or early '72, you and your husband signed some releases for $25,000 in both names, which was the Exhibit L?

A. Yes.

Q. Strike that. Exhibit M, which I showed you.

And then you and your husband did not receive the checks of Home Insurance Company, is that right?

A. No.

Q. And, then, some time thereafter, in 1972, toward the latter part, you indicated to Mr. Ashton in a phone conversation that you were in bad or pretty dire circumstances, and you needed some money, and he sent you a letter, I believe, which you have identified.

A. Yes.

Q. Now, do you know, Mrs. Hommer—Strike that.

Now, you have indicated to us that you and your husband who have been married for 26 years have been separated for about two, is that about right?

A. We separated the 19th day of June of '72.

Q. Of '72, and was there, to the best of your recollection, any discussion between you and your husband in connection with your separation and the necessary support for you, arrangements for such support, the division of and the distribution of the $25,000 in the Hope. Arkansas case?

A. No. There wasn't a discussion on that. There was no

doubt that I would get the $25,000. There was no disagreement on that, to my knowledge.

Q. Well, in your mind, you considered the $25,000 to be coming to you directly?

A. Yes, I did. I was the one that was hurt.

Q. And that whatever was in the other release would go to your husband directly. Is that because he was hurt?

A. The $4,000, the car was my car. My husband has his car. That was my car. My insurance company did reimburse me for it until the case was settled, and they were to get their money back, so I figured that would come in my name also. It was my car, driven by my husband.

Q. Well, was there ever any, I suppose, discussion with Mr. Ashton at any time from the time that you retained him until the time you received $14,000 in March of '74? Was there any discussion by you with him concerning the distribution of the proceeds of the claim against the City of Hope?

A. You mean prior to the time I knew that it had been settled?

Q. Well, no, at any time did you discuss with him your understanding, I suppose, that you were to get, outside of counsel fees, all of the proceeds from the $25,000 settlement with the City of Hope?

A. Oh, yes. That was made clear, that that was to be mine.

Q. All right. Now, do you know, if you know, tell us, when such discussions which cleared up the issue were had between you and Mr. Ashton, if you remember?

A. No. I know repeatedly I said it was my money. My husband got the $4,000 that was to be his.

Q. Do you ever remember Mr. Ashton's telling you that your husband wanted a piece of the $25,000?

A. Yes. I do remember my husband, I mean Mr. Ashton

telling me that, and my husband says that there is—it isn't right, that the only thing he wanted was his $4,000?

Q. Okay. Well, now, were you ever in Mr. Ashton's office when Mr. Ashton sought to contact or call your husband or any attorney who may have been representing your husband?

A. No. I wasn't in his office when he made the call. I knew that he made the calls.

Q. What calls do you now remember or did you learn were made by him?

A. I learned Mr. Ashton had called my husband and also my husband's attorney, Mr. Miller.

Q. Mr. Miller in Altoona?

A. Yes, Harold Miller.

Q. And when was that, if you remember?

A. I had my husband in court February the 9th of '73 for support. It was just prior to that time. It was after my husband had retained Mr. Miller and prior to that time he hadn't had Mr. Miller, so it was just shortly prior to the hearing.

Q. Mrs. Hommer, you and your husband, I think you have told us, separated in June of 1972.

A. 2, June the 19th.

Q. And the matter of the support before the court came before the court in February of '73?

A. That's true.

Q. And it is your recollection that if there were any discussions between your husband's attorney and Mr. Ashton, it would have been shortly before February of '73?

A. That's true.

Q. Could it have been in '72, shortly after you were separated?

A. Oh, no.

Q. It could not have been?

A. My husband did not have Mr. Miller. He did not have an attorney. In fact, neither one of us did on that.

Q. There was no litigation or no lawsuit or support action filed?

A. No. No. We had an attorney draw up a paper, just a temporary separation was all. We did not retain attorneys for that.

Q. During this period of time after you signed the releases, the release which I have shown you and identified as Defendant's Exhibit M, with Home Insurance Company for the $25,000, you still were suffering from the effects of the accident, is that not true?

A. Oh, yes.

Q. And after, in addition to that interim period in 1972 and throughout 1972, you suffered from the results of the accident, and in addition you had problems of your mother's illness, is that not correct?

A. I still suffer from the accident.

Q. Well, did you also in '72 suffer from the accident and also have the problems of your mother's illness?

A. Yes.

Q. And do you remember when Mr. Ashton said to you, "Mrs. Hommer," quote, "You will get all of the money at the same time"? Do you remember that?

A. Mr. Ashton said that to me quite a few times when I was pressing for the money.

Q. Well, tell me,—

Mr. Orr: Excuse me, your Honor. I object to Mr. Freeland interrupting this witness.

Mr. Freeland: I am sorry, your Honor. I have a bad habit of thinking the question was answered.

The Court: Yes. I don't know what she said. Can you give your answer again?

The Witness: I said Mr. Ashton told me quite a few

times that everything would be settled at once: all the money would come through at one time.

Mr. Freeland: All right.

The Witness: When the Pacatte case was settled, I would, the Home Insurance Company would pay off, everything would come through at once.

Q. Now, conceding that he said that a number of times to you, will you tell us, if you can remember, whether he told you a specific time when he told you that, you know, within a month or a couple of months, Mrs. Hommer? I'm not—

A. The last time he told me that was three days before I received, three or four days before I received the letter from Mr. Price, the copy of the letter.

Q. All right. Now, that would be in February or March of 1974?

A. That's true. I had just returned from Texas, called Mr. Ashton to let him know that I was back, and due to some problems, I said, "Just let's take anything we can and get out of this."

I remember this very distinctly, and he said I had been patient, not to lose patience.

Q. All right. Now,—

A. That it was surely coming up that spring.

Q. I am sorry.

A. That was my—the gist of that conversation, and I said, well, all right, then, it was coming up, the Pacatte case.

Q. All right. Now, is it a fact that there were other occasions when he said substantially the same thing?

A. Yes, he did.

Q. And on all of these occasions, did you know that the maximum you could receive from the insurer for the City of Hope, Arkansas was $25,000 and you would in fact receive that?

A. Yes.

Q. And the unresolved dollars and cents would really relate, as you understood it, to the claim against the people who had the camper?

A. The Pacattes, yes.

Q. And that's still not resolved in terms of the settlement, is that right?

A. No.

Q. And it was about that part of the case that you were deposed or testified in St. Louis in the spring of this year?

A. It was a deposition.

Q. Deposition?

A. The case is coming up the 4th day of February at the present time.

Q. Of '75.

The Court: Just for the sake of the record, how do you spell this Pacatte?

The Witness: Oh, P-a-c-a-t-i-a, I believe, Judge. It is Pacatte.

The Court: P-a what?

The Witness: P-a-c-a-t-i-a.

The Court: T-i-a?

The Witness: Pacatte. It is a very peculiar name.

Wait a minute. Here, I have it. Just a moment. P-a-c-a-t-t-e.

The Court: P-a-c-a-t-t-e?

The Witness: That's right.

By Mr. Freeland:

Q. Mrs. Hommer, did Mr. Ashton ever tell you that your husband made claim to part of the $25,000 settlement from the City of Hope?

A. Yes, Mr. Ashton did tell me that.

Q. Could you tell us, to the best of your recollection, when he told you that?

A. Mr. Ashton told me that he was afraid Jack would claim part of—would try to claim half of it. He never told me that Jack had made a definite claim. He told me that Jack told him when the settlement came that he wanted half of it or something like that.

Q. Now, can you—

Mr. Orr: Excuse me, your Honor. I object. She hasn't finished the answer. At least she is hesitating, and I just wish you would let the witness finish.

Mr. Freeland: I will, Mr. Orr. I apologize to the Court and the witness, but the witness lowered her voice just as I lower mine, and I suppose I thought she was finished.

A. My husband and I had quite a talk about this. My husband said that he didn't. The only thing he said was his $4,000. He didn't make any claim.

I know Mr. Ashton did tell me several different times that Jack had indicated or told him when the settlement came through he wanted half of it.

Q. Now, did you ever ask your husband directly and specifically whether he made or was making a claim to any part of the $25,000?

A. I was too angry at my husband to ask him anything. If he felt that way, if he felt he deserved it, I did say to him once that he didn't deserve it. That was in anger, but I never asked him.

Q. Now, did Mr. Ashton ever tell you that the reason for the hold-up was because of this claim or alleged claim by your husband to some part of the fund?

A. Just very recently. He told me that very recently.

Q. But that would be after March of '74, would that be right?

A. Yes.

Q. Now, did you ever tell your husband that Mr. Ashton had sent you two checks, each in the amount of $2500?

A. I told my husband when I found out the settlement had been made and when I found out definitely, and I told him I was coming in after the money.

In fact, I talked to him even before I did Mr. Ashton and told him with the deduction of the $5,000 I had received and then I told him about the two checks I had received.

Q. Would it be fair to say that you did not tell him in November of '72 when you received the first $2500 check?

A. Mr. Freeland, we were separated at the time, and my business was not Mr. Hommer's.

Q. All right. I understand. But, see, the thing about it is I have to get a yes or no sometimes. So it would be fair to say you didn't tell him, would that be right, because it wasn't any of his business?

A. No, the check went right to my mother's doctor, and so there was no need to tell him anything.

Q. Do you know, Mrs. Hommer, can you recall what percentage of the settlement of the claims growing out of the accident in Arkansas Mr. Ashton, as your attorney, was to receive?

A. Upon my retaining Mr. Ashton, he said if we went to court it would be a third; without going to court, if he could carry the settlement through, it would be a fourth. That was the agreement.

Q. All right. Now, one-third of $25,000 would be $8,333 and some pennies, is that about it?

A. I don't have my pencil.

Q. What?

A. Approximately, yes.

Q. Right, and, then, if you took $8,333 and $5,000 which you got in November and January of '72 and '73,—

A. You're figuring that on a third basis. It was on a fourth, if we didn't go to court, and we didn't go to court on it.

Q. I understand. I am just trying to find out where it came from in the first place, and then—So. therefore, you took what was the total of the $5,000 and the $8,333, and if you subtracted that $13,333 from $25,000, you would get $11,666, is that right?

A. Yes.

Q. But if you did it at 25 per cent rather than—

A. 33-1/3.

Q. —one-third of 33-1/3 per cent, when you had subtracted everything and the $5,000 that had been advanced, you would get $14,250, is that right?

A. That's right.

Q. Okay.

A. That was the discrepancy in Mr. Ashton's and my figures, because I figured we didn't go to court. I was going on the fourth basis.

Q. In other words, you had not actually gone to trial, though there had been a case filed, is that right? You assumed—

A. Yes, there was a case filed. I am not up on that, but we hadn't gone to court.

Mr. Freeland: Right. Thank you, Mrs. Hommer. That's all I have.

Redirect examination

By Mr. Orr:

Q. Mrs. Hommer, a couple of other questions. When in

the sequence of events did Mr. Ashton first mention that there was a hold-up because Mr. Hommer was claiming a part of it?

A. I beg your pardon?

Q. When did Mr. Ashton first come to you and talk to you about holding up the settlement because there was—Mr. Hommer was claiming part of it?

A. That has been very recent that he claimed that was the reason for the hold-up. He said Mr. Hommer knew that the settlement had been made.

When Mr. Hommer and I discussed this, in fact, Friday, Mr. Hommer became very angry and said that he did not know this settlement had been made and why did I think he kept asking me, which Mr. Hommer did. He would call me constantly, when is this settlement going to be made, when are you going to get the money, and, in fact, he had asked me just a very, very short time before this letter arrived from Mr. Price, and Mr. Hommer said he did not know the settlement had been made.

Q. And when you said very recently,—

Mr. Freeland: I will move to strike the answer as being unresponsive.

Mr. Orr: Part of it is very responsive. She said very recently.

Mr. Freeland: All right. Everything after very recently, then.

The Court: Well, motion denied.

The Witness: Will you excuse me just a minute?

The Court: Do you want to take a recess?

The Witness: No, I will be all right. Let me take these.

By Mr. Orr:

Q. When you said recently, how recently?

A. Very recently.

Q. Was it during this trial?

A. It was mentioned during this trial.

Q. Where?

A. When Mr. Ashton and I were talking outside there.

Q. Did he mention it the day—

A. I believe that Mr. Ashton had mentioned it once before to me, when I was in to see him.

Mr. Orr: That's all.

Mr. Freeland: I have no further questions, Your Honor.

Mr. Orr: We have no further questions. You are excused.

(Witness excused.)

* * *

# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-797

JAMES A. ASHTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner contends that his use of the mails was not sufficiently related to the fraudulent scheme charged in the indictment to sustain his conviction under the mail fraud statute and that the evidence did not establish a fraudulent scheme.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent three-year prison terms, subject to parole eligibility after he had served three months, and was fined $300 on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, an attorney, had been retained by Beatrice and Jack Hommer to prosecute their personal injury claims against the City of Hope,

Arkansas (I Tr. 61-63).[1] In late 1971 or early 1972, the Hommers authorized petitioner to settle their claims against the City of Hope with the understanding that Mrs. Hommer would receive $25,000 and Mr. Hommer would receive $4,000 from the settlement (I Tr. 63-64). On January 21, 1972, the insurers of the City of Hope issued two checks to petitioner: one payable to John and Beatrice Hommer and to James Ashton, attorney, in the amount of $25,000; and the other payable to John Hommer and James Ashton, attorney, in the amount of $8,155.57 (II Tr. 7). Without informing the Hommers that their claims against the City of Hope had been settled, petitioner deposited the two checks in his personal bank account (II Tr. 12-13; Gov't Exhs. 30, 31, 37).

Mrs. Hommer frequently contacted petitioner thereafter to inquire whether he had made any progress in settling the case (I Tr. 66). Petitioner always told her that he was continuing to work on the settlement, but that she would not receive any money until the entire case had been settled (I Tr. 65-66).[2] Finally, Mrs. Hommer contacted petitioner in late 1972 and informed him that she desperately needed money to defray family medical expenses. Petitioner did not disclose to Mrs. Hommer that he had received substantial settlement proceeds approximately eight months earlier, but he agreed to advance her some money. Petitioner mailed Mrs. Hommer a check for $2,500 in November 1972 and an additional check for $2,500 in January 1973 (I Tr. 38-39, 69-70). These two mailings,

---

[1]Mrs. Hommer's claim stemmed from physical injuries she had suffered as a result of an automobile accident. Mr. Hommer's claim was based on loss of consortium following the accident (I Tr. 61-62; Pet. 3).

[2]The Hommers had also filed suit against the owners of another automobile that had been involved in the accident (I Tr. 63).

which the government argued at trial had been designed to placate Mrs. Hommer and to permit him fraudulently to retain possession of the settlement proceeds (III Tr. 19-20), formed the basis of the charges against petitioner. After discovering in March 1974 that petitioner had settled her claim against the City of Hope more than two years earlier, Mrs. Hommer demanded and received payment from petitioner (I Tr. 67-70).

Petitioner sought at trial to justify the two-year delay in remitting the settlement proceeds to Mrs. Hommer by attempting to show that marital difficulties between the Hommers had spawned a dispute concerning appropriate allocation of the settlement proceeds between them and that he had not been able to obtain Mr. Hommer's release of all claims against the proceeds until March 1974, at which time he promptly paid Mrs. Hommer. Mrs. Hommer testified, however, that she and her husband were not separated until June 1972 (I Tr. 81), some five months after petitioner had secretly deposited the settlement proceeds in his own account, that petitioner never had informed Mr. Hommer about the January 1972 settlement (I Tr. 92-93), and that Mr. Hommer never had disputed her claim to $25,000 of the proceeds of any settlement that might be negotiated with the City of Hope (I Tr. 81-82).

1. Petitioner first contends (Pet. 6-18) that his use of the mails to send Mrs. Hommer the two $2,500 checks was not sufficiently related to the scheme charged in the indictment to be deemed "for the purpose of executing" the scheme, within the meaning of 18 U.S.C. 1341. More specifically, he argues (1) that the scheme had been fully executed when he received and deposited the settlement checks in January 1972, and that the subsequent mailings therefore could not have been made for the purpose of executing the scheme, and (2) that use of the mails must have been necessary and have been contemplated from the outset of the scheme to be within 18 U.S.C. 1341. These contentions are without merit.

The fact that petitioner had received and deposited the settlement proceeds in his personal bank account in January 1972 does not mean that his scheme to defraud Mrs. Hommer of the proceeds of the settlement was fully executed at that time. The offense charged in the indictment, and established at trial, was of a continuing nature. The extent of the benefits that petitioner could expect to realize from the scheme depended upon his being able to withhold the settlement proceeds from Mrs. Hommer as long as possible. The two $2,500 checks that he mailed to Mrs. Hommer were an integral and material part of the scheme; they were calculated to lull her into a false sense of security, to forestall further inquiry concerning settlement of her claim against the City of Hope and, thus, to permit the fraud to continue without detection. See *United States* v. *Sampson*, 371 U.S. 75; *United States* v. *Ashdown*, 509 F. 2d 793, 799-800 (C.A. 5); *United States* v. *MacClain*, 501 F. 2d 1006, 1012 (C.A. 10).[3]

---

[3]Petitioner's reliance upon *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, is misplaced. In neither *Kann* nor *Parr* did this Court lay "down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' [a fraudulent] scheme." *United States* v. *Sampson*, *supra*, 371 U.S. at 80. In *Kann*, which involved a fraudulent check cashing scheme, and *Parr*, which involved the fraudulent use of a credit card, the perpetrators of the fraudulent schemes had realized all of the benefits that were possible when they cashed the checks or used the cards. The mails were used in those cases, not by the perpetrators of the scheme but by the drawee bank and the credit card company to collect from the victims. In both *Kann* and *Parr*, therefore, it was "immaterial to the consummation" of the schemes how—or, indeed, whether—the bank or the credit card company attempted to adjust their accounts with the victims.

The facts involved in *United States* v. *Maze*, 414 U.S. 395, also relied upon by petitioner, were similar to those in *Kann* and *Parr*. The fraudulent credit card scheme involved in *Maze* had already reached fruition at the time of the mailings, which were merely for the purpose of settling accounts between joint victims of the scheme and were not necessary to the scheme's effectuation or perpetuation.

Neither must use of the mails be absolutely necessary to the success of a fraudulent scheme to be within the mail fraud statute. The fraudulent scheme involved here could perhaps have been executed, as petitioner suggests (Pet. 9), without use of the mails had he required Mrs. Hommer to come to his office to pick up the two $2,500 checks. But the fact that delivery of the checks could have been effected without the mails does not preclude prosecution under the mail fraud statute so long as the mails were in fact used to execute the scheme—as they were here. *E.g., United States* v. *Flaxman,* 495 F. 2d 344, 348 (C. A. 7), certiorari denied, 419 U.S. 1031. In fact, in almost every prosecution under the mail fraud statute the defendants would be able to argue that means other than the mails could have been used to transmit items materially related to the success of the particular scheme. If accepted, petitioner's contention that only those fraudulent schemes that could not have been executed "but for" use of the mails effectively would render the mail fraud statute a nullity.

It is similarly irrelevant to a prosecution under the mail fraud statute that use of the mails may not have been contemplated from the outset. Petitioner apparently interprets this Court's statement in *Pereira* v. *United States,* 347 U.S. 1, 8-9, that one "causes" the mails to be used "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen," to mean that the mailings must either be part of the scheme as originally contemplated or reasonably foreseeable in order to be within the mail fraud statute. As this Court noted in *United States* v. *Maze,* 414 U.S. 395, 399, however, the decision in *Pereira* established the test of whether one has "caused" the mails to be used, within the meaning of 18 U.S.C. 1341, and not whether that use was materially related to the

scheme. Petitioner does not dispute that he "caused" the mails to be used when he sent the two $2,500 checks to Mrs. Hommer.[4]

2. Petitioner also contends (Pet. 18-20) that the evidence at trial was insufficient to show that he had engaged in a scheme to defraud Mrs. Hommer. In support of this contention, he suggests first that the government failed to prove that Mrs. Hommer had a legal interest in the settlement proceeds he had deposited in his personal account. But this suggestion ignores Mrs. Hommer's testimony concerning the genesis of her claim against the City of Hope and her agreement with Mr. Hommer regarding the disposition of any proceeds that might be realized from settlement. When viewed in the light most favorable to the government (see *Glasser* v. *United States*, 315 U.S. 60, 80), the evidence established Mrs. Hommer's legal interest in the proceeds of the settlement.

Finally, petitioner argues that there was insufficient evidence of a scheme to defraud because the government failed to prove that he had "converted" Mrs. Hommer's funds. This argument proceeds from the fact that bank records introduced at trial indicated that a portion of the settlement proceeds, sufficient to cover petitioner's obligation to Mrs. Hommer, remained intact in his account. However, the government was not required to show that petitioner used the proceeds for any particular form of personal gain in order to show that he had defrauded Mrs. Hommer. *E.g.*, *United States* v. *Gaskill*, 491 F. 2d 981, 984-985 n. 5

---

[4]Contrary to petitioner's contentions (Pet. 7), *United States* v. *Sampson*, *supra*, is not to the contrary. This Court held in *Sampson* only that an indictment charging a scheme which from the outset contemplated mailings to lull prior victims into inaction was sufficient to charge violation of 18 U.S.C. 1341. *Sampson* did not hold that the mail fraud statute is not violated unless use of the mails was foreseeable at the outset or was part of the original scheme.

(C.A. 8). Proof of petitioner's unauthorized, secret deposit of Mrs. Hommer's funds into his own account was sufficient to establish his fraudulent conversion of those funds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

FEBRUARY 1976.

DOJ-1976-02